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APPENDIX A

(Filed Apr. 26, 1962)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

No. 15,330

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Petitioner*,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES
OF AMERICA, *Respondents*,

PHILIP R. CONSOLO, BANANA DISTRIBUTORS, INC., *Intervenors*.

No. 16,366

PHILIP R. CONSOLO, *Petitioner*,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES
OF AMERICA, *Respondents*,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Intervenor*.

No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Petitioner*,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES
OF AMERICA, *Respondents*,

PHILIP R. CONSOLO, *Intervenor*.

On Petitions for Review of Orders of the Federal Maritime Board, now Federal Maritime Commission.

Before: WILBUR K. MILLER, Chief Judge, and BAZELON and WASHINGTON, Circuit Judges.

Judgment

These cases came on to be heard on the record from the Federal Maritime Board, now Federal Maritime Commission, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court:

(1) that the order dated June 22, 1959, on review in case No. 15,330 is affirmed; and

(2) that the order dated March 30, 1961, on review in cases Nos. 16,366 and 16,369 is set aside, and these proceedings are hereby remanded to the Federal Maritime Commission for further proceedings not inconsistent with the opinion of this court.

PER CIRCUIT JUDGE WASHINGTON.

Dated: April 26, 1962.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Petitioner*,

v.

FEDERAL MARITIME BOARD and UNITED STATES OF
AMERICA, *Respondents*.

Motion of Intervenor Philip R. Consolo 1) to Dismiss the Petition for Review for Lack of Jurisdiction, or 2) Alternatively, to Require Petitioner to File Bond

Philip R. Consolo, intervenor in Docket No. 16,369 hereby moves 1) to dismiss the petition for review for lack of jurisdiction, or 2) alternatively to require petitioner to file

a bond in the amount of \$175,000. A Memorandum in support of this Motion is attached.

Oral argument is requested.

Respectfully submitted,

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WILLIAM J. LIPPMAN

AMY SCUPI

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Attorneys for Intervenor

Philip R. Consolo

Memorandum in Support of Motion of Intervenor Philip R. Consolo 1) to Dismiss the Petition for Review for Lack of Jurisdiction, or 2) Alternatively, to Require Petitioner to File Bond

I. THE PROCEDURAL BACKGROUND

* * * * *

II. THE STATUTORY DILEMMA

Consolo is one of the four or five complainants ever to have received a favorable reparation order during the 45-year history of the Shipping Act, 1916. Consolo, understandably, wishes to collect. Flota, equally understandably, wishes to have the reparation order set aside by a reviewing court. It is plain that *some* court has power to order payment to Consolo, and that *some* court has power to review the reparation order. The question posed by this motion is: what court?

We set forth below the relevant statutory provisions. Essentially, there are two distinct lines of statutory authority. The Shipping Act, 1916, in § 30 (46 U.S.C. 829) provides that in case of violation of any Board order for payment of money (as Flota has violated this reparation order), the person in whose favor such order was made

may bring suit within a year in a district court, with the Board's findings and order *prima facie* evidence of the facts found. Under this provision no harm could come to Flota until Consolo files his complaint in a district court.³ When the complaint is filed, Flota can obtain from the district court (and upon appeal, from a court of appeals and the Supreme Court) a full review of the Board's order.

But Flota has not chosen to await filing of a complaint in a district court. Instead, Flota has sought review of the Board's order here, claiming jurisdiction under the Hobbs Act (5 U.S.C. 1031 ff.) Under the Hobbs Act, the courts of appeals review such orders of the Board as were formerly reviewable under § 31 of the Shipping Act (46 U.S.C. 830). (Thus, Flota relies on a second and distinct line of statutory authority to sustain its right to review in this court.

Consolo recognizes that Flota is entitled to one review of the Board's order in one court. But the filing of Flota's petition in this court presents the painful prospect of two reviews. Thus, the court might proceed to assume jurisdiction, pass upon Flota's petition, and deny it. At this point, absent any arrangement guaranteeing Consolo collection under the reparation order, Consolo would have to commence a new suit, in a district court of another circuit, to collect on the order (and such suit will have to be begun within a year of the date of the Board's order). Still worse, in such a district court suit, Flota might seek to introduce new evidence, arguing that under § 30 of the Shipping Act the Board's order is only *prima facie* evidence of the facts. Then, arguing changed facts, Flota might ask for a new construction of the law from the district court. In other words, Flota might try to obtain a double review of the Board's order, and this court's labor in re-

³ Suit cannot be commenced in the District of Columbia. We have requested counsel for Flota to accept service of a complaint in the District of Columbia, and our request has been refused.

viewing the order upon the facts of record before the Board might become so much waste motion.

A construction of the statutes which provides a double review is obviously untenable. A review in this court which does not result in a final disposition of the controversy is, equally obviously, equally undesirable. Consolo, for his part, accepts any construction of the statutes which results in one lawsuit leading to one final disposition of the controversy.

Accordingly, by this motion we move alternatively:

(1) To dismiss Flota's Petition for Review on the ground that this court lacks jurisdiction. If this motion is granted, Consolo will promptly file a complaint in a district court, and the controversy will be completely decided in that court (with a possible appeal).

(2) Alternatively, if this court determines that it has jurisdiction to review the Board's order, we move that Flota be required to file a bond guaranteeing payment to Consolo if the Board's order is sustained. In this manner, the entire controversy can be settled and concluded before this court.

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All relevant facts bearing on this court's jurisdiction are now before this court. Only harm can come from any postponement of a decision on jurisdiction. If jurisdiction is absent, the injured shipper is entitled to begin his suit in district court at once. If jurisdiction is present, the offending carrier should be compelled to post a bond which will permit the controversy to be terminated quickly and cleanly. Absent such a bond, the petition for review becomes not an instrument for justice, but a weapon for obtaining oppressive delay through inconclusive litigation.

III. THIS COURT HAS NO JURISDICTION TO REVIEW AN ORDER
OF THE FEDERAL MARITIME BOARD AWARDING REPARATION

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IV. IF THIS COURT HAS JURISDICTION TO REVIEW THE BOARD'S
ORDER AWARDING REPARATION, PETITIONER SHOULD BE
REQUIRED TO FILE A BOND

We have shown above that the statutes and the precedents support the conclusion that suits to review reparation orders of the Maritime Board are *not* covered by the Hobbs Act, and thus that this court lacks jurisdiction to pass on Flota's petition. It must be conceded, however, that the legislative history of the Hobbs Act reveals a definite Congressional purpose to provide a new, expeditious, and exclusive method of review of agency orders. Thus, in House Report 2122, 81st Cong. 2d sess., the Committee on the Judiciary said:

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There is thus evidence of a plain intent to provide a new and improved mode of review avoiding the need to make a second record before a district court. Moreover, there is some evidence that Maritime Board reparation orders were specifically included within the coverage of the Hobbs Act. Reparation orders of the Board are issued under section 22 of the Shipping Act (46 U.S.C. 821) which allows the filing of complaints with the Board, calls for Board investigation of complaints, followed by orders, and also permits the Board to "direct the payment, on or before a day named, of full reparation to the complainant for the injury caused . . ."

The then solicitor of the Maritime Commission, Mr. Page, told the House Committee on the Judiciary that "the act as drawn specifies appeals from orders made under certain sections of our act. It omits that section under which a vast majority of our orders are issued, section 22 of the

⁹ [Text of Statute omitted]

Shipping Act, 1916, and we feel . . . that the provisions of this act should apply to all reviewable orders of the Maritime Commission [now Maritime Board] . . .”¹⁰ Following Mr. Page’s statement, and exchange of correspondence with Judge Phillips,¹¹ the Hobbs Act was amended to its present form granting to the courts of appeal jurisdiction over all orders reviewable under § 31 of the Shipping Act (46 U.S.C. 830).

Thus, there is evidence of specific congressional intent to extend Hobbs Act review to a wide range of Maritime Board orders, with the aim of utilizing the “more modern” and “best” method of review. This intent has been respected, and the second circuit has held that the Hobbs Act covers the Maritime Board’s orders denying reparation: *D. L. Piazza Co. v. West Coast Line*, 210 F. 2d 947 (C.A. 2, 1954), cert. denied 348 U.S. 839.

The specific questions remain, however, (1) whether the language of the statutes permits an interpretation allowing Hobbs Act review of orders *granting* reparation and (2) whether the intent of the Congress to provide a single, modern, expeditious method of review can be effectuated by providing a means for terminating the controversy in this court.

Any argument supporting review under the Hobbs Act must face at the outset that 5 U.S.C. 1032 begins by granting to the courts of appeals exclusive jurisdiction “to en-

¹⁰ Statement of Paul D. Page, Jr., Hearings before Subcommittee No. 3 and Subcommittee No. 4 of the House Committee on the Judiciary on H.R. 1468, H.R. 1470, and H.R. 2271 of the 80th Congress (1947) and before Subcommittee No. 2 on H.R. 2915 and H.R. 2916 of the 81st Congress (1949), at p. 137. Note that when Mr. Page refers to a “vast majority” of orders made under section 22 he means that most orders were made after hearings on complaints. He did not mean that a vast majority of orders required payment of reparation—for very few reparation orders have ever been entered by the Maritime Board.

¹¹ Hearings, *ibid*, at pp. 145, 147, 149.

join, set aside, suspend (in whole or in part), or to determine the validity of" named orders. There is no explicit provisions for *enforcement* of reparation orders. Nevertheless, 5 U.S.C. 1032 gives the courts of appeals jurisdiction to review such Maritime Board orders "as are now subject to judicial review under section 31 of the Shipping Act (46 U.S.C. 830)." Section 31 of the Shipping Act, in turn, speaks of "suit brought *to enforce*, suspend, or set aside in whole or part," any order of the Board. Therefore, since all § 31 powers are apparently transferred to the courts of appeals, the power to enforce reparation orders is arguably also transferred.¹² In short, if a court of appeals can "determine the validity" of a reparation order and determine that the order is valid, the valid order should be forthwith enforced by the court of appeals. It would be intolerable to contemplate a second complete review of the same controversy.

Assuming, then, that Flota's petition for review is properly before this court, there remains the practical problem of assuring that the entire controversy will be terminated here. The simplest and quickest way of assuring a quick and final end to the controversy is to require Flota to file a bond in this court in an amount sufficient to insure payment of the sum specified in the reparation order in the event this court upholds the order. Such a bond was filed in the only case we are aware of where Hobbs Act review was sought of a Maritime Board reparation order.

* * * * *

If Flota's petition for review is to be heard here, a district court suit on the reparation award clearly must be delayed. By filing its petition here, rather than awaiting suit in a district court, Flota has chosen this forum

¹² If all § 31 powers are not transferred to courts of appeals, there would remain some residual three-judge court jurisdiction—an incredible result. Cf. *Safe Harbor Water Power Corp. v. Federal Power Com'n*, 124 F. 2d 800, 804 (C.C.A. 3d, 1941), cert. denied 316 U.S. 663.

for review. All legal and factual issues can be tried here; legal arguments are of course available, and additional facts (if any) could be brought before this court by the machinery of 5 U.S.C. 1037 (c).

It is difficult to imagine what arguments Flota could use to oppose the filing of a bond. Surely, Flota cannot claim the right to a second complete review in a district court. Equally surely, there can be no question that this court in its discretion can require a bond.

Clearly, Flota has no right to two reviews; equally clearly Flota is entitled to one review. If the one review is to be in this court a bond should be posted; if no bond is forthcoming Flota's petition should be dismissed.¹⁵

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Petitioner,*

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,
Respondents,
PHILIP R. CONSOLO, *Intervenor.*

Intervenor's Reply to Answers to Motion to Dismiss or Require Bond

We repeat that for our part we are content with a reading of the statutes which complies with the purpose of the Hobbs Act to simplify and modernize reviews. The procedures of section 30 requiring suits in district courts

¹⁵ Alternately, the petition could be held in suspense until the controversy is decided in district court.

are tortuous, and highly advantageous to the offending carrier. If the Hobbs Act can be read to allow Flota the option of having its review here, well and good. Flota's election to precipitate review here will speed up termination of the controversy. The issues can be settled here, and if the merits justify a finding that the Board's order was right and valid, the controversy should be at end, and Flota should pay its just debts.

Flota, however, although reprinting the lengthy specification of errors of law and fact which appeared in its petition for review, claims (Answer, p. 27) that even if this Court finds the Board right on the law and the facts, another review is necessary in district court because "a whole range of other issues [all unspecified] is possible." Such a concept of the reviewing function is offensive. If Flota thinks there are "other issues" which are valid defenses, it should have presented them to this Court—or awaited review in the district court and not sought review here. Since review was sought here, the issues should be openly, fairly, and finally litigated here—as Congress intended. There may be two roads to review, but a litigant must choose one.

D. The Bond

The last pages of Flota's answer (Answer, pp. 28-36) contend that this Court, having jurisdiction, should not adopt the procedural means to assure a final disposition of the case. Essentially the claim is that this Court lacks "enforcement" powers and that a bond would confer such powers. The conflict with previous Flota arguments is obvious.

Thus, Flota argues that this Court has jurisdiction (a) because the Hobbs Act transferred all section 31 powers to the courts of appeals and (b) because 31 did apply to reparation orders. Well and good, for if this is so, the section 31 powers "to enforce, suspend or set aside" are

in this Court, and justice can be done between the parties. To do justice requires that a bond be filed, or, if Flota refuses, the dismissal or suspension of review proceedings awaiting disposition of a suit in district court.

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Respectfully submitted,

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Attorneys for Intervenor
Philip R. Consolo

August 8, 1961

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

C. A. No. 18230
C. A. No. 18235

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Petitioner,*

v.

FEDERAL MARITIME COMMISSION

and

UNITED STATES OF AMERICA, *Respondents.*

Prehearing Stipulation

The parties to the above proceedings Flota Mercante Grancolombiana, S.A., (petitioner in No. 18230 and intervenor in No. 18235); Philip R. Consolo, (petitioner in

No. 18235 and intervenor in No. 18230); and respondents Federal Maritime Commission and United States of America (in both proceedings), by their respective attorneys, hereby stipulate as follows:

1. The parties will (and hereby do) jointly request the court to consolidate the above proceedings.

2. Questions Presented.

Counsel have conferred regarding stipulation of the issues herein, but have failed to reach agreement.

(a) Flota Mercante Grancolombiana, S.A., states the issues in case Nos. 18230 and 18235 as follows (upon the assumption they will be consolidated):

Where this Court had previously found "substantial evidence" supporting petitioner's [Flota's] contentions that it would be inequitable to force it to pay reparations for violations of the Shipping Act, had set aside a reparations order against Flota, and had directed the Federal Maritime Commission "to consider whether, under all the circumstances, it is inequitable to force Flota to pay reparations, or at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board":

1. Whether the Commission erred in thereafter finding, contrary to the Court's findings, that there was no equity whatever in Flota's contentions; in refusing to permit further evidence, and in reinstating the principal portion of the vacated award, under the same measure of damages; whether it failed to consider and make findings upon all relevant circumstances and issues; and whether its findings, rulings, and conclusions are supported by substantial evidence, consistent with law, and sufficient to sustain its ultimate conclusions.

2. Whether the preparation of the Commission's Report and Order and participation in the Commission's

private meetings, by the same attorneys who had earlier contended to this Court that Flota had violated the Shipping Act and should be forced to pay reparations, and by their subordinates, and the failure to disclose these facts and to permit Flota to except to their undisclosed proposed report and order, violated sections 5(c), 3, 7, and 8 of the Administrative Procedure Act or deprived Flota of fair administrative procedure.

3. Whether the Commission overstated the reparations award, by understating costs, overstating the length of the reparations period, and failing to make proper findings upon the issue of mitigation of damages.

4. [In case no. 18235 only], whether the Commission erred in reducing the former award in two respects and in denying the shipper's claim for prejudgment interest.

(b) Petitioner Philip R. Consolo states the issues as follows:

When the Federal Maritime Commission had found that a common carrier by water had illegally excluded a shipper, did the Commission err in awarding reparation (in a second award after a remand from this court)

- (1) By computing the reparation award based on a freight rate in effect after the period of exclusion rather than using as a basis the freight rate actually in effect during the period of exclusion;
- (2) By computing the reparation award based on stevedoring costs at a port not served during the reparation period rather than the port served during the reparation period;

- (3) By denying interest both from the times of injury to the date of award, and from the date of the first reparation award.

(c) Respondents Federal Maritime Commission and the United States of America state the issues as follows:

- (1) Where the Court of Appeals remanded this case to the Commission "to consider whether, under all circumstances it is inequitable to force Flota to pay reparations, or at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board," did the Commission, upon considering the equity of the award, as directed by the Court, properly reject Flota's claim seeking a reduction of, or elimination of reparations, on equitable grounds?
- (2) Did the Commission employ a lawful measure of damages in computing reparations?
- (3) In applying its measure of damages, did the Commission use accurate figures to represent gross profit from sales of bananas; freight charges; and stevedoring and incidental expense?
- (4) Did the Commission err in denying Consolo interest from the date of each sailing from which he was unlawfully excluded, and in denying Consolo interest on the amount finally awarded (\$106,001.00) from 60 days after March 28, 1961, the date of the Board's first order awarding reparations to Consolo (\$143,370.98)?

3. The parties will and hereby do jointly request the Court to permit the Joint Appendix heretofore filed in Case No. 15330 and the Supplemental Joint Appendix heretofore filed in Case Nos. 16366 and 16369 (all three cases being

prior proceedings before this Court involving the same administrative record as Nos. 18230 and 18235), and to be used as a portion of the printed joint appendix in the instant proceedings.

• • • • •
s/ J. ALTON BOYER

J. Alton Boyer

*Attorney for Petitioner Flota
Mercante Grancolombiana*

s/ ROBERT N. KHARASCH

Robert N. Kharasch

*Attorney for Petitioner
Philip R. Consolo*

s/ ROBERT E. MITCHELL

Robert E. Mitchell

*Deputy General Counsel
Federal Maritime Commission*

s/ IRWIN A. SEIBEL

Irwin A. Seibel

*Attorney
Department of Justice*

[See Addendum, next page]

Addendum to Prehearing Stipulation

By typographical error, the parties omitted to include in the prehearing stipulation intervenor Philip R. Consolo's statement of the issues raised by Flota's petition for review, C.A. No. 18230. The following statement should be insterted directly below paragraph (3) under (b) on page 3 of the Prehearing Stipulation:

Intervenor Phillip R. Consolo states the issues raised by Flota's petition as follows:

(4) When the Federal Maritime Commission had found that a common carrier by water had illegally excluded a shipper, did the Commission err in awarding reparations (upon remand from this court) in finding in accordance with the issue posed by the order of remand that it was not "inequitable" to force the carrier to pay reparations found to be due.

(5) [Consolo takes the position that issue #2 stated by Flota is not timely raised and not in issue.]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963

No. 18,230

FLOTA MERCANTE GRANCOLOMBIA, S.A.

v.

FEDERAL MARITIME COMMISSION
and
UNITED STATES OF AMERICA

No. 18,235

PHILIP R. CONSOLO

v.

FEDERAL MARITIME COMMISSION
and
UNITED STATES OF AMERICA

Before: Burger, Circuit Judge, in Chambers.

Prehearing Order

The prehearing stipulation of the parties and the addendum attached thereto, submitted pursuant to Rule 33(k) of the General Rules of this court having been considered, the stipulation and addendum are hereby approved, and it is

ORDERED that the said stipulation and addendum shall control further proceedings in this case unless modified by further order of this court, and the stipulation and addendum shall be printed in the joint appendix of the parties herein.

Dated: Dec. 16, 1963